

**REDACTED DECISION – DOCKET NUMBER 08-211 TSE C - By A.M. “FENWAY”
POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED for DECISION
on OCTOBER 18, 2013 – DECISION ISSUED on APRIL 18, 2014**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

SYNOPSIS

PUBLIC HEALTH

**IMPLEMENTING TOBACCO MASTER SETTLEMENT AGREEMENT
FINDINGS AND PURPOSE**

The agreement between West Virginia and certain major tobacco companies is referred to as the “Tobacco Master Settlement Agreement” and implementation of this agreement is codified in West Virginia Code Section 16-9B-1 *et seq.* Enforcement of the agreement is codified in West Virginia Code Section 16-9D-1 *et seq.*

PUBLIC HEALTH

**ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER
SETTLEMENT AGREEMENT
DEFINITIONS**

In Article 9D, the West Virginia Legislature has given the Tax Commissioner enforcement duties under the agreement. *See* W. Va. Code Ann. §16-9D-2(c) (West 2014) (“Commissioner” means the duly appointed head of the agency responsible for collection of the excise tax on cigarettes”).

PUBLIC HEALTH

**ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER
SETTLEMENT AGREEMENT
CERTIFICATIONS; DIRECTORY; TAX STAMPS**

“Directory of cigarettes approved for stamping and sale. – The commissioner shall develop and publish on the tax division's website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (a) of this section and all brand families that are listed in the certifications, except as provided in subdivisions (1) and (2) of this subsection.” W. Va. Code Ann. §16-9D-3(b) (West 2014).

PUBLIC HEALTH

**ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER
SETTLEMENT AGREEMENT
CERTIFICATIONS; DIRECTORY; TAX STAMPS**

“The tax commissioner shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family.” W. Va. Code Ann. §16-9D-3(b)(3) (West 2014).

PUBLIC HEALTH

**ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER
SETTLEMENT AGREEMENT**

CERTIFICATIONS; DIRECTORY; TAX STAMPS

“The commissioner may not remove any manufacturer or brand family from the directory unless the manufacturer and all distributors and other stamping agents registered under article twelve, chapter eleven of this code, have been given at least seven days' prior notice of the intended removal by electronic mail or first class mail the notices shall be e-mailed or posted to the addresses provided by the manufacturers, distributors or other stamping agents for this purpose.” W. Va. Code Ann. §16-9D-3(b)(3)(A) (West 2014).

PUBLIC HEALTH

**ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER
SETTLEMENT AGREEMENT**

CERTIFICATIONS; DIRECTORY; TAX STAMPS

Failure of a manufacturer, distributor or other stamping agent to receive notice under paragraph (A) or (B), subdivision (3), subsection (b) of this section, or failure of the state to provide notice of any addition to or removal from the directory shall not relieve the distributor or other stamping agent of its obligations under this article. W. Va. Code Ann. §16-9D-3(b)(3)(C) (West 2014).

PUBLIC HEALTH

**ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER
SETTLEMENT AGREEMENT**

CERTIFICATIONS; DIRECTORY; TAX STAMPS

“Prohibition against stamping or sale of cigarettes not on the directory. -- It is unlawful for any person: (1) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; or (2) To sell, offer, or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory” W. Va. Code Ann. §16-9D-3(c)(1)&(2) (West 2014).

PUBLIC HEALTH

**ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER
SETTLEMENT AGREEMENT**

PENALTIES AND OTHER REMEDIES “

Revocation of business registration certificate and civil money penalty. -- In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three of this article, or any rule adopted pursuant thereto, the commissioner may revoke or suspend the business registration certificate of the distributor, stamping agent or other person in the manner provided by article twelve, chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection (c), section three of this article constitutes a separate violation. The commissioner may also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand

dollars upon a determination of violation of subsection (c), section three of this article or any rules adopted pursuant thereto.” W. Va. Code Ann. §16-9D-8(a) (West 2014).

WEST VIRGINIA OFFICE OF TAX APPEALS

CONCLUSION OF LAW

Failure of a distributor such as the Petitioner to receive notification of a cigarette brand being removed from the approved list via first class mail is not a defense to the money penalty issued in this matter.

WEST VIRGINIA SUPREME COURT OF APPEALS

The elements of equitable estoppel are a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice First Am. Title Ins. Co. v. Firriolo, 225 W. Va. 688, 695-96, 695 S.E.2d 918, 925-26 (2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

CONCLUSION OF LAW

The Tax Commissioner should not be equitably estopped from assessing the money penalty in this matter.

TAXATION

WEST VIRGINIA OFFICE OF TAX APPEALS

HEARING PROCEDURES

In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code. R. §§121-1-63.1 and 69.2 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS

CONCLUSION OF LAW

The Petitioner has failed to meet its burden of showing that the money penalty issued against it by the Tax Commissioner was erroneous, unlawful, void, or otherwise invalid.

FINAL DECISION

On June 18, 2008, the Auditing Division of the West Virginia State Tax Commissioner’s Office (hereinafter the Tax Commissioner or Respondent) issued an audit notice of assessment against the Petitioner. This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 16, Article 9D *et seq.*, of the West

Virginia Code. The assessment was for the sale of cigarettes not listed in the directory of approved brands or manufacturers during the period from June 1, 2005, through March 31, 2008. The assessment was for additions to tax (a money penalty) in the amount of \$_____. Written notice of this assessment was served on the Petitioner, as required by law.

On August 18, 2008, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§11-10A-8(1); 11-10A-9 (West 2010). This Tribunal then ruled that it did not have jurisdiction to hear the matter and that Order was appealed to the Circuit Court of Kanawha County. The matter was remanded back to the Office of Tax Appeals and a hearing was held on May 6, 2013. Thereafter, the parties filed legal briefs. At the conclusion of the briefing schedule this matter became ripe for decision.

FINDINGS OF FACT

1. The Petitioner is an out of state corporation that provides inventory to convenience stores in Kentucky, Ohio and West Virginia. Included in the inventory it provides is tobacco products.¹

2. In 1998 the state of West Virginia was one of the states that entered into a settlement agreement with various tobacco manufacturers as the result of previously filed national litigation. This agreement is commonly referred to as the “master settlement agreement.”

3. In 2003 the West Virginia Legislature drafted Article 9D of Chapter 16 of the state code, which codified certain violations and penalties regarding the agreement. One of the

¹ In January of 2012, the Petitioner was sold to another firm; however, the money penalty that forms the basis of this matter was not part of the sale.

provisions of Article 9D was a prohibition on selling cigarettes that were not listed in a directory of approved brands. Article 9D also created money penalties for selling unapproved brands.

4. Article 9D gave the Tax Commissioner enforcement duties.

5. Upon passage of Article 9D, and creation of the directory, Tax Department employees communicated with entities such as the Petitioner to explain the provisions of the new law and how the web based directory would work. The record is not clear if these communications were done via in person meetings or through written correspondence.

6. The Petitioner did receive written communication asking it to provide an email address for future correspondence. The Petitioner did not provide the Tax Commissioner with an email address.

7. The Petitioner's only witness was its President, Mr. A. Despite his uncertainty about how he learned the ins and outs of the directory, he did know of its existence, had it bookmarked on his computer, and used it when he was researching whether new brands that the Petitioner was thinking about selling were on West Virginia's approved list.

8. When cigarette brands were removed from the web-based directory of approved brands, notification of the changes was sent to sellers only via email. If the Tax Commissioner did not have an email address for a seller, it received no written notification of the changes.

9. In March or April of 2008, an auditor with the West Virginia Tax Department audited the Petitioner's books and records regarding cigarettes and tobacco products. This audit revealed that the Petitioner had sold cigarettes that were not on the list of approved brands. Specifically, the audit showed that during the period between June 1, 2005 and March 31, 2008, the Petitioner had sold 6,420 packs of Marathon cigarettes, 770 packs of Berkley cigarettes and 720 packs of Slim Price cigarettes.

10. Berkley cigarettes were removed from the directory of approved brands on June 23, 2005, and Marathon cigarettes were removed on June 23, 2007. The record is not clear as to the date that Slim Price cigarettes were removed from the list.

11. The money penalty amount that forms this assessment constitutes the number of cartons sold that were not on the approved list, times the retail price, times five hundred percent.

DISCUSSION

Despite the fact that this matter involves the tobacco master settlement agreement, the West Virginia Legislature has clearly given the Tax Commissioner enforcement authority and the Petitioner does not quibble about this point. *See* W. Va. Code Ann. §16-9D-1 *et seq* (West 2014). The Petitioner's first argument is that under West Virginia Code Section 16-19D-3 the Tax Commissioner cannot penalize the sale of unapproved cigarettes without first giving sellers written warning that brands have been removed from the directory. The Petitioner also argues that during the audit period, Marathons, Berkleys and Slim Prices were listed in the directory as being approved.

Obviously the agreement between the states and the tobacco companies that led to the master settlement agreement was complex with a lot of moving parts. For our discussion here, it is sufficient to state that one part of the agreement was new monitoring and policing by the states of brands and amounts of cigarettes sold. One of the places that part of the agreement is dealt with is in Article 9D of Chapter 16 of the West Virginia Code. In Section 3 of Article 9D, the Tax Commissioner is directed to set up a directory that lists which cigarette brands are approved for sale in West Virginia and which are not, based upon various factors that are not relevant to this discussion. *See* W. Va. Code Ann. §16-9D-3(b) (West 2014). Section 3 goes on to clearly

state that it is a violation to stamp, sell or possess cigarettes that are not on the approved list. *See* W. Va. Code Ann. §16-9D-3(c) 1&2 (West 2014). Finally, West Virginia Code Section 16-9D-8 allows the Tax Commissioner to revoke or suspend the business registration certificate, and penalize any distributor who stamps or sells cigarettes that are not on the approved list. *See* W. Va. Code Ann. §16-9D-8(a) (West 2014). The money penalty in Section 8(a) is the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars.

The Tax Commissioner and/or the West Virginia Attorney General's office set up a website and it contained (among other things) the directory of approved brands. During the period after Article 9D was drafted and while all of the provisions of the new law were being worked out, representatives from the Tax Department and/or the Attorney General's office communicated with the entities that would be bound by the new rules, such as the Petitioner here. We say "communicated" because the record is not clear as to whether there were face-to-face meetings, or just communication through the mail. Mr. A testified that he could not remember if he learned about the new law's provisions in person or in writing. Nonetheless, the Tax Commissioner's only witness testified that the Petitioner would have received numerous correspondences concerning the new law's requirements and the existence of the directory of approved brands. The Petitioner does not deny receiving multiple letters on these topics. At least some of these letters asked the Petitioner to provide an email address so it could be given written notice of cigarette brands that had been removed from the approved list. The Petitioner did not provide an email address where these notices could be sent.

This failure on the part of the Petitioner to provide an email address creates the main argument in this case. The Petitioner argues that the Tax Commissioner needed to notify it in

writing when a brand was removed from the approved list. The Tax Commissioner argues that his failure to provide written notice is not an adequate defense to the penalties issued in this case. In addition to discussing the creation of the directory, and the prohibition against selling unapproved cigarettes, Section 3 also deals with how the Tax Commissioner is to inform sellers of changes to the list.

(3) The tax commissioner shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family.

(A) The commissioner may not remove any manufacturer or brand family from the directory unless the manufacturer and all distributors and other stamping agents registered under article twelve, chapter eleven of this code, have been given at least seven days' prior notice of the intended removal by electronic mail or first class mail the notices shall be e-mailed or posted to the addresses provided by the manufacturers, distributors or other stamping agents for this purpose.

(B) The commissioner shall transmit by email or other practicable means to each distributor or other stamping agents registered under article twelve, chapter eleven of this code, to affix West Virginia tax stamps to cigarettes notice of any addition to or removal from the directory of any tobacco product manufacturer or brand family.

(C) Failure of a manufacturer, distributor or other stamping agent to receive notice under paragraph (A) or (B), subdivision (3), subsection (b) of this section, or failure of the state to provide notice of any addition to or removal from the directory shall not relieve the distributor or other stamping agent of its obligations under this article.

(4) Every tobacco product manufacturer selling cigarettes in this state and every distributor or other stamping agent affixing West Virginia tax stamps to packages of cigarettes for sale in this state shall provide and update as necessary an electronic mail address to the commissioner for the purpose of receiving any notifications required by this article.

W. Va. Code Ann. §16-9D-3(b) (West 2013). The Petitioner argues that the Tax Commissioner violated West Virginia law when he failed to provide it with written notice, via first class mail, of changes to the directory. The Tax Commissioner argues that despite his failure to provide

notice by first class mail, Subsection (b)(3)(C) puts the ultimate obligation of compliance on the seller/distributor/stamping agent. We are inclined to agree with the Tax Commissioner on this point, for two reasons. First, Subsection (b)(3)(C) is clear and unambiguous. Obviously, it is a little odd for the Legislature to have given the Tax Commissioner a mandatory statutory duty in Subsection (b)(3)(A) and then immediately state that there will be no repercussions for failing to meet that duty, but that is what the Legislature has done. This Tribunal is unable and unwilling to ignore a clear and unambiguous statute. Moreover, the Petitioner was clearly informed by the presiding administrative law judge that Subsection (b)(3)(C) seemed fatal to its argument concerning the failure to receive adequate notice.

JUDGE POLLACK: Well, you know, I think you may need to file a brief.

PETITIONER ATTORNEY: Okay.

JUDGE POLLACK: Because ---.

PETITIONER ATTORNEY: Yeah.

JUDGE POLLACK: And here would be ---

PETITIONER ATTORNEY: Because the interplay ---

JUDGE POLLACK: --- my question.

PETITIONER ATTORNEY: --- between it and the other statute.

JUDGE POLLACK: Well, yeah, Subsection C.

PETITIONER ATTORNEY: C, uh-huh (yes).

JUDGE POLLACK: I mean ---

PETITIONER ATTORNEY: The impact of C.

JUDGE POLLACK: --- doesn't that ---?

PETITIONER ATTORNEY: Right.

JUDGE POLLACK: On paper ---.

ATTORNEY MUDRINICH: Subsection C is my brief.

JUDGE POLLACK: Right.

PETITIONER ATTORNEY: Yeah.

JUDGE POLLACK: On paper, Subsection C would seem to just ---

PETITIONER ATTORNEY: Trump.

JUDGE POLLACK: --- kill you.

PETITIONER ATTORNEY: It does.

JUDGE POLLACK: So ---.

PETITIONER ATTORNEY: Why don't I just brief that one issue?

See Transcript at p. 87. Despite this admonition, the Petitioner's two briefs (initial and reply) both fail to mention Subsection (b)(3)(C) in any fashion, let alone offer any legal analysis as to why it does not apply in this matter. As a result, we cannot rule that the money penalty in this matter should be vacated because of the Tax Commissioner's failure to advise the Petitioner, via first class mail, of changes to the directory.²

The Petitioner next argues that the three brands of cigarettes at issue, were in fact still on the directory of approved brands when it sold them. We find this argument by the Petitioner to be simply incorrect and at odds with the evidence in this matter. Mr. A testified that there was no doubt that cigarettes were sold in West Virginia after they had been removed from the approved list.

PETITIONER ATTORNEY: --- they were on the approved list?

MR. A: --- the sales occurred after the delisting date of those brands, which I --- you know, and I don't contest that at all. I mean it's pretty black and white. Those products were sold after the delisting date of the product.

PETITIONER ATTORNEY: So under the letter of the statutes, then, that are in play, we don't contest that they were sales of NPM product into West Virginia after they were delisted?

MR. A: Oh, absolutely not.

See Transcript at p. 37-38. Now, at the briefing stage, the Petitioner claims the exact opposite. It makes this claim because of how West Virginia's website for cigarette reporting was set up. In addition to containing the directory of approved brands, the website also allows distributors to electronically file certain reports, including one called a Schedule 3/Schedule A filing. While there was testimony regarding the reason for filing this report, it does not matter for the purposes of our discussion here; this was one of perhaps, many administrative functions that sellers and

² Neither party discusses the import of Subsection (b)(4), which mandates that all distributors such as the Petitioner provide the Tax Commissioner with a valid email address for the purpose of receiving notifications such as changes to the directory. We believe this Subsection lends strength to our ruling.

distributors needed to perform under the master settlement agreement. The key fact is that as part of filing their Schedule 3/Schedule A's, distributors would list how much of each brand they had sold during a certain period. The electronic filing form allowed distributors to pick a brand from a pull down list. For reasons that are not clear from the record, once brands were removed from the approved brands list, the Tax Department/Attorney General's office failed to remove those brands from this pull down list.

What we find troublesome with the Petitioner's argument is how it attempts to twist the plain facts of this matter. The Petitioner's brief does not argue that confusion was created by removing brands from one place and leaving them in another. Instead, it calls the Schedule 3/Schedule A filing part of the website the "directory" and thereby claims that the brands at issue were in fact still listed in the directory at the time of sale. We find this argument to be totally without merit and quite disingenuous. Our distress with this argument might be less palpable if Mr. A had not testified that he knew about the existence of the directory, had used it to check for approved brands, but never used it to check for delistings.

MR. A: Yeah. Well, we're talking about ---. Typically, the only time I went to this section of the website that we're talking about where you look for approval of participating and nonparticipating manufacturers' brands is when I begin selling --- when I'm contemplating selling that brand into the state. Typically, I ---.

PETITIONER ATTORNEY: So let me just stop you there. So I'm going to start selling Marathon cigarettes into West Virginia, meaning I am Ohio Valley; correct?

MR. A: Correct.

PETITIONER ATTORNEY: And so you go online and you perform this search. And it would have come up initially as approved --- as being on the approved list; ---

MR. A: Correct.

PETITIONER ATTORNEY: --- is that right?

MR. A: Correct.

PETITIONER ATTORNEY: Okay. At any point then after you do that initial search do you ever go back on to see if the Marathon is no longer an approved product?

MR. A: Typically, no, I did not.

See Transcript at p. 21. Mr. A also testified that he had the directory bookmarked on his computer. *Id* at p. 14. Finally, he stated that the reason he never checked the directory was because he assumed that if a brand was delisted it would disappear from the pull down list for the Schedule 3/Schedule A filings. *See* Transcript at p. 35-36, 41. So, the Petitioner knew of the directory, had it bookmarked, and used it prior to selling new brands. These facts make the Petitioner's claim that the Schedule 3/Schedule A pull down list was, in fact the "directory", quite tenuous.

We should note that even if the Petitioner's President testified that he had never set eyes on the directory, and only used the website for filing forms, this argument about what is and what is not the "directory" would still be a hard sell. Petitioner's Exhibit 2 is a binder with various screen shots from the website.³ The very first page of Exhibit 2 shows the welcome screen from one part of the site and is titled at the top "**Directory of Cigarette Brands Approved for Stamping and Sale in West Virginia.**" Directly below this heading are instructions directing users to use the pull down menu to search for brands that are approved for sale. Clearly, there is nothing confusing about the purpose of this part of the website. A screen shot from the Schedule 3/Schedule A filings part of the website is found at Page 6 of Petitioner's Exhibit 2. This page is titled at the top "**Cigarette Distributors' Schedule 3/Schedule A Filing.**"

³ The Tax Commissioner also introduced an exhibit with screenshots from the website. Due to a mistake on the part of the undersigned and the transcribers, this exhibit is misidentified in the official transcript as State's Exhibit 2. In actuality, the Tax Commissioner only introduced one Exhibit in this matter. The Office of Tax Appeals apologizes for this confusion.

By statute, the West Virginia Office of Tax Appeals is not bound by the Rules of Evidence.

The office of tax appeals is not bound by the rules of evidence as applied in civil cases in the circuit courts of this state. The office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs.

W. Va. Code Ann. §11-10A-10(c) (West 2014). This Tribunal has always treated this language as directing the judges to use their common sense in all matters before him or her. Common sense tells us that the “directory” in this matter is that portion of the website that says “**Directory of Cigarette Brands Approved for Stamping and Sale in West Virginia.**” Therefore, we rule that the Petitioner’s argument that the Schedule 3/Schedule A filings part of the website is actually the directory is not borne out by the facts.

The Petitioner’s final argument is that the Tax Commissioner should be equitably estopped from assessing the penalty in this case. At the conclusion of the evidentiary hearing in this matter there was discussion between counsel for the parties and the presiding administrative law judge regarding the ability of this Tribunal, as a part of the executive branch, to hear and rule on an equitable estoppel argument. Both parties were instructed to brief this issue. Unfortunately, neither party adequately did so. The Petitioner relies on Hudkins v. Public Retirement Board, 647 S.E.2d 711 (W.Va. 2007) as standing for the proposition that the doctrine of equitable estoppel can be asserted against a governmental agency. The Petitioner is correct, however, the Hudkins Court never addresses the question of whether there is a separation of powers problem by this Tribunal hearing and ruling on an equity argument. The Tax Commissioner, in his brief, states that “[J]urisdiction over matters of equity lies within the courts of this State.” See Respondent’s Brief In Support of State’s Position p. 4. The Tax

Commissioner's characterization is not entirely accurate. What Article VIII, §6 of the West Virginia Constitution actually says is that "Circuit Courts shall have original and general jurisdiction . . . of all civil cases in equity" W.Va. Const. art. VIII §6. The Tax Commissioner also relies on two previous decisions of this Tribunal, Docket Nos. 07-159 and 07-502, wherein the Office of Tax Appeals ruled that it could not rule on an equity argument. In similar fashion to the Tax Commissioner's brief, these two previous decisions relied on Article VIII, Section 6 and doctrine of separation of powers, but, again, offered no legal analysis. Instead, these two decisions also just take it as a foregone conclusion that this Tribunal cannot entertain such arguments.

In the absence of some citation to legal authority (aside from Article VIII, Section 6) we find the Tax Commissioner's argument to be unpersuasive. If one uses the rules of statutory construction on Article VIII, Section 6, and takes the words at their plain, an ordinary meaning, a different conclusion is reached. Article VIII, Section 6 is talking about the original and general jurisdiction of the Circuit Courts of this state. This Tribunal is not asserting jurisdiction over a civil case in equity. In fact, the question of whether we can hear an equitable estoppel argument against the Tax Commissioner is not a jurisdictional question. We clearly have jurisdiction to hear this matter. So the question becomes, in hearing this matter, can the Petitioner present arguments regarding the legal doctrine of equitable estoppel? Due to the fact that the Legislature has created the *quasi-judicial* entity that is the Office of Tax Appeals, with the express purpose of adjudicating disputes such as this, and because we are the court of record, we do not see any logical reason to prevent Petitioners from asserting whatever legal arguments they choose. Allowing Petitioners to make such an argument does not equate with this Tribunal trying to assert jurisdiction over a civil case in equity. We would also point out that equitable estoppel is

a legal doctrine, with elements created by judges, as opposed to a traditional equity argument. A good example of this distinction is when a party, like a small rural board of education, misses their deadline to get a refund of motor fuel excise taxes. We regularly inform such Petitioners that if they truly missed their statutory deadline, we cannot rule in their favor, no matter how compelling their story of financial hardship is; in other words, we are not a court of “equity”. It seems to us that a situation such as that is a far cry from allowing the Petitioner here to argue the legal accepted, centuries’ old doctrine, of estoppel. As such, until there binding authority from the West Virginia Supreme Court of Appeals, or until we are presented with persuasive authority from another jurisdiction, we will allow parties before us to argue all well-established legal doctrines such as equitable estoppel.

The elements of equitable estoppel are:

a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice

First Am. Title Ins. Co. v. Firriolo, 225 W. Va. 688, 695-96, 695 S.E.2d 918, 925-26 (2010).

Based upon the facts in this matter, the Petitioner fails to meet two of the elements of equitable estoppel. The Tax Commissioner has not made any material misrepresentations to the Petitioner and the Petitioner certainly had the means to ascertain the real facts. Our ruling might be different if the only listing of approved and unapproved cigarettes was the pull down menu associated with the Schedule 3/Schedule A filings, the one that was never updated. However, as stated above, Mr. A testified that not only did he know about the existence of the actual directory (the one that is labeled “DIRECTORY OF APPROVED BRANDS” in all caps) but that he

occasionally checked it, but only for brands that the Petitioner was thinking about starting to sell, as opposed to checking to see what brands had been delisted. As for the delisted brands, he testified that he assumed that they would be removed from the Schedule 3/Schedule A filings pull down menu. The Petitioner's erroneous assumptions are not the same as a material misrepresentation by the Tax Commissioner. We therefore rule that the Tax Commissioner should not be equitably estopped from issuing the penalties that form the basis of this matter.

CONCLUSIONS OF LAW

1. The agreement between West Virginia and certain major tobacco companies is referred to as the "Tobacco Master Settlement Agreement" and implementation of this agreement is codified in West Virginia Code Section 16-9B-1 *et seq.* Enforcement of the agreement is codified in West Virginia Code Section 16-9D-1 *et seq.*

2. In Article 9D, the West Virginia Legislature has given the Tax Commissioner enforcement duties under the agreement. *See* W. Va. Code Ann. §16-9D-2(c) (West 2014) ("Commissioner" means the duly appointed head of the agency responsible for collection of the excise tax on cigarettes").

3. "*Directory of cigarettes approved for stamping and sale.* – The commissioner shall develop and publish on the tax division's website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (a) of this section and all brand families that are listed in the certifications, except as provided in subdivisions (1) and (2) of this subsection." W. Va. Code Ann. §16-9D-3(b) (West 2014).

4. “The tax commissioner shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family.” W. Va. Code Ann. §16-9D-3(b)(3) (West 2014).

5. “The commissioner may not remove any manufacturer or brand family from the directory unless the manufacturer and all distributors and other stamping agents registered under article twelve, chapter eleven of this code, have been given at least seven days' prior notice of the intended removal by electronic mail or first class mail the notices shall be e-mailed or posted to the addresses provided by the manufacturers, distributors or other stamping agents for this purpose.” W. Va. Code Ann. §16-9D-3(b)(3)(A) (West 2014).

6. Failure of a manufacturer, distributor or other stamping agent to receive notice under paragraph (A) or (B), subdivision (3), subsection (b) of this section, or failure of the state to provide notice of any addition to or removal from the directory shall not relieve the distributor or other stamping agent of its obligations under this article. W. Va. Code Ann. §16-9D-3(b)(3)(C) (West 2014).

7. “*Prohibition against stamping or sale of cigarettes not on the directory.* -- It is unlawful for any person: (1) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; or (2) To sell, offer, or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory” W. Va. Code Ann. §16-9D-3(c)(1)&(2) (West 2014).

8. “*Revocation of business registration certificate and civil money penalty.* -- In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor, stamping agent or any other person has violated subsection (c), section three of this article, or any rule adopted pursuant thereto, the commissioner may revoke or suspend the

business registration certificate of the distributor, stamping agent or other person in the manner provided by article twelve, chapter eleven of this code. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection (c), section three of this article constitutes a separate violation. The commissioner may also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of violation of subsection (c), section three of this article or any rules adopted pursuant thereto.” W. Va. Code Ann. §16-9D-8(a) (West 2014).

9. Failure of a distributor such as the Petitioner to receive notification of a cigarette brand being removed from the approved list via first class mail is not a defense to the money penalty issued in this matter.

10. The elements of equitable estoppel are a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice First Am. Title Ins. Co. v. Firriolo, 225 W. Va. 688, 695-96, 695 S.E.2d 918, 925-26 (2010).

11. The Tax Commissioner should not be equitably estopped from assessing the money penalty in this matter.

12. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code. R. §§121-1-63.1 and 69.2 (2003).

13. The Petitioner has failed to meet its burden of showing that the money penalty issued against it by the Tax Commissioner was erroneous, unlawful, void, or otherwise invalid.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the money penalty assessment issued against the Petitioner on June 13, 2008, for additions to tax in the amount of \$_____ is hereby **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date Entered